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FUNCTIONS OF ORALITY IN AUSTRIAN AND AMERICAN CIVIL PROCEDURE*

ADOLF HOMBURGER**

INTRODUCTION

In the United States, orality, in the sense of oral proceedings in open court, has been taken for granted in actions at law since the beginning of its history. The necessity of an oral hearing follows from fundamentals of procedure at law imported from England, including trial by jury1 and the right to cross-examine all witnesses whose testimony forms the basis of decision.2 Oral testimony in open court is the traditional mode of proof-taking in jury trials. And the psychological foundation and operational effectiveness of cross-examination as a tool in the search for truth depends on the spontaneity of an oral response to an oral question in the sight and hearing of the triers of fact. The exclusionary rules barring hearsay evidence safeguard the right to cross-examine3 by requiring direct and immediate contact of the court with the sources of information.

In view of the firm entrenchment of orality in actions at law, it is not surprising that the delay-ridden, secret mode of trial of issues of fact by written interrogatories in equity cases in the eighteenth and early nineteenth centuries4 did not survive the merger

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1. The seventh amendment of the Federal Constitution and nearly all state constitutions guarantee trial by jury. See F. James, Civil Procedure 337 (1965).
2. See 5 J. Wigmore, Evidence § 1362 (3rd ed. 1940) [hereinafter cited as Wigmore].
3. Id.
4. Bentham gives the following drastic description of equity procedure: Under the name of a bill, a volume of notorious lies delivered in, with three or four months' time for a first answer, and after exceptions taken of course, two or three months for a second—then amendments made to the bill, with more such delays, and more succeeding answers—then a cross bill filed on the other side, and a second such cause thus mounted on the shoulders of the first—then volumes heaped
of law and equity in the United States for long. While in the process of merger equity procedure prevailed in many other areas, the reverse was true as far as the manner of proof-taking was concerned. In New York, the Constitution of 1846 abolished the Court of Chancery and prescribed that testimony in equity cases shall be taken in like manner as in cases at law. This constitutional command was carried out by New York's code of 1848. With the spread in the United States of codes fashioned after the New York model, the oral trial became the general rule in state courts in all cases of legal and equitable origin. In the federal courts the trend towards orality in equity cases started even earlier, in 1789. After a varied history and regressive changes back to written procedure, orality ultimately prevailed with the adoption of the Equity Rules of 1912.

The history of orality on the European continent differs markedly from that in the United States. In the civil law the dominance of the century old written procedure of the jus commune, a procedure quite similar to equity practice, was broken only after a long and bitter struggle which lasted three hundred years and

upon volumes of depositions—then after years thus employed, a decree obtained, by which nothing is decided—then the whole matter, and everything that has been made to grow out of it, sent to be investigated in the hermetically sealed closet of a sort of under judge called a Master—with days of attendance separated from each other by days or weeks—length of attendance each day nominally an hour really half or a quarter of the time. . . . The judge paid for three attendances and bestowing one. . . . The party whose interest or purpose is served by delay, attending or not attending, according as by attendance or non-attendance that interest and that purpose are best served—then in the course of a few more years thus employed out of a dozen or two of parties, one carried off by death and then another—and upon each death another bill to be filed, and the same or similar course of retardation to be run.


6. N.Y. Const. art. VI, § 10.
7. New York's Code of 1848 was drafted by the Commissioners on Practice and Pleading, a three-man commission including David Dudley Field who was the chief draftsman. N. Y. Laws 1848, C.379. See also C. E. Clark, supra note 5, at 21-23.
8. The New York Code profoundly affected development of procedure in the United States. It was adopted by the majority of the states. See A. Reppy, The Field Codification Concept, in David Dudley Field: Centenary Essays 17 (1949); C. E. Clark, supra note 5, at 23-31.
9. Judiciary Act § 30, 1 Stat. 88 (1789), provided for proof by oral testimony and examination of witnesses in open court in equity cases.
One of the central themes of the continental reform movement was orality. As viewed by the reformists, orality represented a new doctrine of procedure, including not only an oral hearing-in-chief, but also the related principles of immediacy, publicity, concentration, free evaluation of evidence, and augmentation of judicial authority, which found expression in varying degrees in statutory provisions.

Today orality is firmly entrenched on the Continent as well as in the United States. Most scholars and practitioners will agree that civil litigation should culminate in an oral hearing conducted before the trier of fact. However, orality in Europe is not synonymous with orality in the United States. While it is true that both the American and Continental systems rely on orality, they place different emphasis on it in the various stages of procedure. Differences pertain not only to the extent of orality, but more importantly, to its quality and nature. In short, there are sufficient similarities and dissimilarities in the implementation of the principle of orality to whet the appetite for comparison.

In order to provide a focus for this discussion, the American form of orality will be critically examined and compared with orality under the Austrian system. Austrian procedure has been chosen for several reasons. One is purely personal. It so happens that the author's only experiences as a practitioner were in Austria and the United States. However, there are also objective considerations for the choice. Austria's famous Code of 1895 has won international acclaim of the highest order—imitation. Its influence extended far beyond the borders of the Austrian monarchy, affecting developments of procedure in other systems to the present day.
Moreover, Austria's Code was drawn with great sensitivity towards problems of orality. It was the first code which made a realistic and calculated effort to use orality beyond the area of proof-taking.

Delineating the scope of discussion, it should be noted that the term "orality" is employed in this paper to describe the use of verbal communications within the framework of civil litigation. In dealing with such communications three different functions of orality will be identified, each of which plays a major role in one, the other, or sometimes in both systems: (a) the employment of orality as a means and technique of discovery of evidence before the trial, as distinguished from production of evidence at the trial; (b) orality as a medium for colloquy between the court, the parties and their attorneys in connection with the trial of an action; and (c) orality as a mode of proof-taking at the trial. While these functions overlap in some respects, it is helpful to separate them for analytical purposes since they serve different goals and are emphasized in varying degrees in the two systems.

The preceding enumeration of functions of orality in civil litigation is not exhaustive. Oral communications of all sorts occur both in Austrian and American procedure which do not fit into the categories specified above. To illustrate, oral procedures are utilized in both systems to sift contested from uncontested cases. Examples are the calendar call in the American practice and a major portion of the business conducted at the Austrian "initial diet" (Erste Tagsatzung), discussed in a different context later in this study. Also oral communications in the form of speech-making are used in both systems in certain phases. For example, in the American jury trial, counsel's closing statement to the jury is in the

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19. E.g., the revision of the German Code of 1877 by the amendments of 1924, R.G.8.1. I S. 135, and, particularly, 1933, R.G.B1. I S. 780, was largely inspired by the Austrian legislation. See I STERN-Jonas, KOMMENTAR ZUR ZIVILPROZESSORDNUNG 8, 9 (18th ed. Schörike 1953); SCHIMA, Die österreichische Zivilprozessordnung im Lichte neuerer Prozeßtheorie, Tentschrift zur Fünfzigjahrfieber der österreichischen Zivilprozessordnung 250, 256 (1948).

Similarly the 1942 reform of Swedish procedure was governed largely, though not exclusively, by the principles embodied in the Austrian legislation. See R. GINSBURG & A. BRUZELIUS, CIVIL PROCEDURE IN SWEDEN 34 n.135 (1965). Most recently the reform of the Greek system of procedure was influenced by the Austrian model. See Prof. Rammas' lecture on the Greek reform of civil procedure, April 23, 1964, Wiener Juristische Gesellschaft, summarized, in ÖZJ 1964, at 458 et seq.

nature of oratory used as a tool of persuasion.\textsuperscript{21} In general, however, oratory has been on the decline both in the Austrian\textsuperscript{22} and American trial of first instance.\textsuperscript{23} On the other hand, oratory in the form of oral arguments presented by counsel plays a role in American pre- and post-trial motion practice, in the Austrian intermediate appellate practice\textsuperscript{24} and in the American appellate practice\textsuperscript{25} in all instances. These and other uses of orality which hold little attraction from a comparative viewpoint are outside the scope of this study.

I. ORALITY IN AID OF DISCOVERY BEFORE TRIAL

American pretrial procedures are broadly designed to enable the parties to prepare for trial;\textsuperscript{26} in addition, they offer ample opportunity to avoid a trial in situations suitable for pretrial disposition.\textsuperscript{27} Among modern techniques serving these goals, the

\textsuperscript{21} While in theory the right to make closing statements applies in jury as well as in non-jury cases (see Cornwell v. Dickel, 6 N.Y. Civ. Pr. 416 (C.P. 1885); J. Weisstein, H. Korn, & A. Miller, New York Civil Practice § 4016.02 (1969)), as a practical matter it has little significance in non-jury cases. See Lake Ontario Nat'l Bank v. Judson, 122 N.Y. 278, 282, 25 N.E. 367, 368 (1890); J. Weisstein, H. Korn, & A. Miller, supra § 4016.04. The privilege to address the jury is considered a valuable right which must not be abridged by the court.

\textsuperscript{22} The Austrian Code contains no explicit provision for speech-making by the parties in first-instance trials. However, Sperl points out that the right to make a presentation is inherent in the Code and follows from the provisions of ZPO §§ 176 et seq. See H. Sperl, Lehrbuch der Bürgerlichen Rechtspflege 371 (1930). According to this writer's recollection, "speeches" were rare.

\textsuperscript{23} An experienced American counsel points out that "[t]he modern methods of practicing our profession have had a tendency to discourage court oratory and the development of orators." F. Wellman, The Art of Cross-Examination 21 (4th ed. 1962).

\textsuperscript{24} ZPO § 486 (4). However, the parties may waive the oral hearing, id. § 492 (1). See G. Petschek & F. Stagel, Der Österreichische Zivilprozess 385-89 (1963). The procedure before the court of last instance (Revisionsgericht) is written unless the court orders an oral hearing, ZPO § 509. G. Petschek & F. Stagel, supra at 394-95. Since the turn of the century this has happened only once.


\textsuperscript{26} Pleadings, motions for more definite statements and demands for bills of particulars in jurisdictions which follow traditional lines, and the modern pretrial conference to be discussed later in this study are among devices designed primarily to identify the subject of the cause, prepare the litigants for the trial and enable the court to manage the litigation effectively and with concentration.

\textsuperscript{27} Motions to dismiss for lack of jurisdiction, legal insufficiency of the claims or defenses, or other defects which under the particular jurisdiction's governing policy are deemed suitable for pretrial disposition are examples of motions designed to shortcut the proceedings by accelerated judgments and avoid a full scale trial. See, e.g., Fed. R. Civ. P. 12(b) [hereinafter cited as FRCP]; N.Y. Civ. Prac. Law and Rules 3211 (McKinney 1963) [hereinafter cited as CPLR]. A device of more recent origin is the motion for summary judgment, available in the United States to plaintiffs and defendants, which is aimed at the elimination of cases presenting no genuine issue of fact worthy of a trial. See, e.g., FRCP 56; CPLR 3212 and 3213.
oral pretrial examination of the adverse party and of non-party witnesses has the greatest practical significance. It probes deeply into the opponent's case and enables the litigants to gain access to and tap virtually every source of information available to the other side, including the opponent's knowledge of facts and location of evidence. Through pretrial depositions and other disclosure devices, the parties may gather arguments and proof for use at the highly concentrated American trial which requires the marshalling of all means of attack and defense on one single occasion. Moreover, superior knowledge of facts gained through pretrial discovery enables the parties to form a reliable opinion about the strength of their cases and to make realistic and reasoned appraisals of the value of their claims, preparing the ground for pretrial summary disposition where there is overwhelming strength on one side, and for compromise when the odds are more or less even.

The pretrial interrogation of witnesses proceeds as permitted at the trial, except that the scope of examination is much broader. Under the Federal Rules of Civil Procedure and similar provi-

28. In contrast to continental procedure, parties can be examined as witnesses in the American procedure.
29. E.g., FRCP 30 (a). The federal rules governing discovery were amended effective July 1, 1970. References in this paper are to the rules as amended. Under these rules, witnesses may be compelled to attend by the issuance of a subpoena. They may also be required, by subpoena duces tecum, to produce, for copying and inspection, documents and other tangible things in their custody. Id. 45 (d). Parties need not be summoned by subpoena. If they fail to attend after service of a proper notice of examination under rule 30(b)(1), they are subject to the sanctions of rule 37 (d). The notice may be accompanied by a request for production of documents and other tangible objects pursuant to rules 30 (b) and 34.
30. Pretrial discovery devices under the federal rules, in addition to deposition of party and non-party witnesses upon oral or written questions, consist of: written interrogatories to parties; production of documents or things or permission to enter upon land or other property in the control of the parties, for inspection or other purposes; physical and mental examinations of the parties or of persons in their custody or legal control. See FRCP 26 (a), 30, 31, 33-36. Pretrial discovery has out-distanced all other devices for trial preparation. In only 7% of the cases tried in federal courts has there not been discovery. See Professor Rosenberg's address on Changes Ahead in Federal Pretrial Discovery, 45 F.R.D. 481, 488 (1969). For the history of discovery, see Millar, The Mechanism of Fact-Discovery, 32 ILL. L. REV. 424, 437-44 (1937); RAGLAND, DISCOVERY BEFORE TRIAL 6, 7, 13-17 (1932); F. JAMES, CIVIL PROCEDURE § 6.1 (1965).
31. R. SCHLESINGER, COMPARATIVE LAW 219 (2d ed. 1959) refers to the American trial as "a single, dramatic, concentrated and uninterrupted presentation of everything that bears on the dispute."
32. A field survey of discovery undertaken by the Project for Effective Justice of Columbia Law School yielded no "positive evidence" that discovery promotes settlements. 43 F.R.D. 211, 220 (1967). The finding has been questioned. See Mr. Doskow's address on Changes Ahead in Federal Pretrial Discovery, 45 F.R.D. 498, 504 (1969). In any event, even if discovery does not promote settlements, it creates a rational basis for compromise. Cf. 1 M. BELL, MODERN TRIALS, § 109 (1954).
sions in many states, it extends to any matter not privileged that is relevant to the subject matter of the action. The circumstance that the information sought will be inadmissable at the trial is no ground for objection. Neither hearsay evidence nor evidence tending to "fish" for information is excluded under the Federal Rules. It is therefore true that the pretrial oral examination not only "has all the advantages which confrontary interrogation has over epistolary examination," but it has also many advantages which confrontary examination at the trial stage does not offer.

Pretrial depositions frequently are taken in successive sessions, extending over a period of time as new sources of information become available. The episodic style of the proceedings bears some resemblance to the piece-meal fashion in which cases are often tried under the Austrian and German law. The similarity, however, is only superficial. Pretrial depositions do not take place before the court exercising adjudicatory function, or normally even a delegated judge or master, but in most cases in law offices in the presence of the lawyers and their clients. The stenographer who prepares a transcript of the testimony, usually a "notary" without judicial powers, acts as referee and administers the oath to the witnesses. Under the Federal Rules the

33. At least thirty states have provisions for discovery identical with or similar to the federal rules.
34. Privileged matter is excluded from discovery. See, e.g., FRCP 26(b)(1). The exception protects, for example, professional and governmental communications.
35. E.g., id. For a detailed discussion of the rule see 4 J. Moore, Federal Practice ¶ 26.02 [J]; 26.19-26.25 (2d ed. 1968) [hereinafter cited as Moore]. Note that the scope of examination under state practice is not always as broad as under the Federal practice.
36. E.g., FRCP 26(b)(1), which permits discovery of information "reasonably calculated to lead to the discovery of admissible evidence."
37. See Hickman v. Taylor, 329 U.S. 495, 507 (1947). J. Moore, Federal Practice and Procedure 1049 (1962), quoting Judge Clark, states that "examination before trial may be had not merely for the purpose of producing evidence to be used at the trial, but also for discovery of evidence, indeed for leads as to where evidence may be located." Under the Federal Rules this includes discovery of the identity, and location of persons having knowledge of any discoverable matter. FRCP 26(b)(1). Schima, supra note 19, at 271, states that "fishing expeditions" (Erkundigungsbeweise) are not permitted in Austria.
38. J. Moore, supra note 37, at 1109.
39. See infra note 79 et seq. and accompanying text.
41. E.g., FRCP 28.
42. E.g., id. 30 (c). With respect to institutional differences between the office of "notary" under the American and continental law, see R. Schlesinger, Comparative Law 482 (2d ed. 1959).
device is normally self-administering, requiring neither court intervention nor court authorization. The court merely stands by to resolve disputes as they arise between the participants. Most importantly, while both the examination before trial and proof-taking at the trial use orality in similar fashion, that is by oral examination and cross-examination, they serve entirely different purposes. Testimony at the trial is given to enable the triers of fact to exercise their judicial function. Examination before trial, on the other hand, is a lawyers' device, designed to give them first hand information about the facts and means of proof. Orality thus has assumed a new dimension in American procedure. It aids the parties in preparing cases, rather than the courts in deciding them. Barring special circumstances, depositions which do not qualify as admissions by the adverse party cannot be used at the trial, except to contradict or impeach a witness in open court. Normally, witnesses examined before the trial must be reexamined at the trial. The examination before trial, therefore, does not defeat the principles of orality and immediacy which require that testimony be presented directly to the organ of decision.

The impression should not be left, however, that the pretrial examination and other discovery devices have been absorbed by the adversary system without struggle. It is the theory of the adversary system "that each litigant is most interested and will be most effective in seeking, discovering, and presenting the materials which will reveal the strength of his own case and the weakness of his adversary's case so that the truth will emerge to the impartial

43. FRCP 30 (a), 30 (b)(1), 30 (b)(2), 45(d).
44. Id. 30 (c) and 43 (b).
45. Pretrial examinations must, of course, be distinguished from the private, oral interviews of prospective witnesses conducted regularly by American lawyers or their investigators in the absence of the adverse party and reduced to a written statement which the questioner prepares and the examined person trustingly signs, only too often, without even reading it. The practice of taking such statements is fraught with the danger of abuse and improper influence. It is frowned upon, though not entirely excluded, in continental countries. In the United States, it has not only been tolerated, but moreover judicially approved. As the eminent American judge Learned Hand pointed out, it would be a "fantastic extreme" to consider the "universal" custom of interviewing witnesses before trial and reducing their testimony to writing as unprofessional for an attorney in any country. Becker v. Webster, 171 F.2d 762, 765 (2d Cir. 1949). However, it should additionally be pointed out that parties and other persons may obtain statements previously made by them concerning the action or its subject matter, free of the limitations which normally govern disclosure of materials prepared in anticipation of litigation or for trial. FRCP 26 (b)(3); cf. CPLR 3101 (e).
46. E.g., FRCP 32 (a).
47. See Millar, Civil Procedure Reform in Civil Law Countries, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 125 (1949).
tribunal that makes the decision. Disclosure, by contrast, is an inquisitorial process. It compels each litigant to reveal before the trial, at the behest of his opponent, information tending to weaken his own case and strengthen the opponent’s case. Tension between the inquisition-oriented disclosure and the competition-oriented trial frequently nurtures disputes which require subtle adjustment. Controversy centers around such matters as the relevance of the information sought, privileges claimed as a shield against disclosure, sanctions for refusal to make disclosure and protection against abusive disclosure practices. One of the most troublesome questions, expressive of the difficulty of preserving the adversary nature of the trial and yet giving full effect to a policy of wide-open pretrial disclosure, relates to the discovery of materials prepared in anticipation of litigation or for trial. The United States Supreme Court, in a landmark case, solved the dilemma by taking a position midway between total disclosure and total privilege. It granted to such materials a qualified immunity, allowing discovery only on a substantial showing of necessity or justification.

More important for the purpose of this study than the

49. See address by Professor Rosenberg, Changes Ahead in Federal Discovery Practice, 45 F.R.D. 481, 484 (1969). The speaker noted that after adoption of the Federal Disclosure Rules “a tension developed between the large objectives of the litigation process — on the one hand, truth-finding; on the other hand, preserving a role for the lawyer as a responsible champion of one side in a contest between adversaries.”

50. Hickman v. Taylor, 329 U.S. 495 (1947). Under the Hickman doctrine, “necessity or justification” exists when the denial of disclosure “would unduly prejudice the preparation of petitioner’s case or cause ... hardship or injustice.” Id. at 509. The federal rules, as amended, codify the essence of the Hickman doctrine by requiring, as a condition of disclosure, a showing:

that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. FRCP 26(b)(3). The rule, however, grants protection against disclosure of “the mental impression, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation,” which are contained in the materials, and upholds the right of the parties and other witnesses to obtain copies of their own statements without any special showing. Id. See also supra note 45. As to information obtained from an expert, a special rule governs. See FRCP 26(b)(4). For a detailed discussion, see Advisory Committee Note, 48 F.R.D. 497, 499-505 (1970); cf. CPLR 3101(c) and 3101(d)(2) (New York distinguishes between an attorney’s work product and materials created in preparation for litigation—granting absolute immunity from disclosure to the former and only qualified immunity to the latter). For further discussion of the New York rules, see J. Weinstein, H. Korn, & A. Miller, New York Civil Practice ¶¶ 3101.42-3101.43, and 3101.50-3101.55 (1967). See also Siegel, Disclosure Under the CPLR: Taking Stock After Two Years, Eleventh N.Y.S. Judicial Conference Report 148 (1966). With respect to difficulties experienced in drafting the aforesaid federal rules, see Proposed Amendments
specific rule is the policy imbedded in the decision to preserve the adversarial nature of the American trial, modified and weakened, as it is, by the arrival of discovery: "[A] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to function either without wits or on the wits borrowed from the adversary."\(^{51}\)

Notwithstanding these problems, disclosure on the whole has worked well.\(^{52}\) Modern lawyers could not perform the work of the law effectively without the tool of discovery, including particularly oral depositions. The new use assigned to orality has been chiefly responsible for producing profound changes in the nature of the adversary system. If, despite discovery, surprise still plays a major role in the American trial, as some have claimed,\(^{53}\) it is not because of the unexpected use of unknown evidence, but because of the inability of the contestants to anticipate the use which will be made at the trial of evidence which is or should be known. The possibility of this sort of surprise emphasizes the need of effective representation of all litigants regardless of their economic resources from the very outset of the litigation. If there is still "drama" in American litigation, it has shifted largely from the trial to the pretrial stage. Here it loses some of its intensity because the sense of finality and the doomsday atmosphere of the court-


\(^{52}\) The Advisory Committee on Civil Rules has stated, for example, that: The Columbia Survey [referring to a field survey undertaken by the Columbia Law School] concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement.


\(^{53}\) See \textit{W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM} 105-08 (1968).
room is missing. Trials may have become duller since the advent of discovery, but they produce a better justice.

What is the relation of discovery to delay in court? According to a recent survey the amount of time spent on discovery is fairly “limited.” However, even if discovery in itself does not cause delay, it may well be contributing to public tolerance of delay. Pressure for relief from court congestion would probably be greater, were it not for the palliative of discovery. Lawyers can get along despite excessive delay because the testimony of important witnesses has been “canned” in the form of transcripts of the pretrial examination, conducted in the presence of both parties. If the witness is not available at the time of trial, the transcript may be read into evidence, but where he is available, he must testify in person. However, the memory of the event may well have faded when the witness finally appears in court several years after the event. He is able to testify because he can “refresh” his recollection by reading the transcript of his testimony before he goes to court. The question is whether there is anything left which can be refreshed. In many cases, time will have blotted out all significant details. The witness, as a matter of fact and perhaps without consciously realizing it, testifies on the basis of what he said when he was examined before trial—not on what he remembers. Orality and immediacy are the losers since the source of information available to the triers of fact in reality is the transcript of the witness’ testimony rather than his memory.

Turning to Austrian procedure, we find no device comparable in scope or purpose to American pretrial discovery. To be sure, there is the Austrian Beweissicherungsverfahren—procedure

54. See H. Kalven, H. Zeisel & B. Buchholz, Delay in Courts (1959). The shocking condition of delay in American metropolitan courts is exemplified by the Annual Reports of the Judicial Conference of the State of New York, which contain elaborate statistical data. E.g., Eighth N.Y.S. Judicial Conference Report 10 (1963). Delay of three to four years is common in the populated counties of New York City; similar conditions prevail in the metropolitan area of Chicago, Illinois. It is interesting to note that no comparable problem of delay exists in Austria, where the courts manage to dispose of pending litigation in a matter of months. The average duration of a lawsuit in the Gerichtshöfen (courts above the lowest ordinary courts), for example, is reported between 144 and 147 days. Bajons, Book Review, 10 Zeitschrift für Rechtsvergleichung 318, 320 (1969).

55. W. Glaser, supra note 53, at 70.

56. FRCP 32(a)(3); CPLR 3117(3).
to preserve proof. As the name indicates, this is a device for advanced proof-taking to preserve the testimony of witnesses and experts or the evidence obtained through a view. Proof-taking is shifted from the hearing-in-chief to an earlier moment in order to avoid the impending loss of the evidence through lapse of time, as, for example, may happen with either the death of an ill person or a change of the circumstances, which are the subject of a view. Anticipatory proof-taking of this sort, which is similar to the American perpetuation of testimony, may, but need not, antedate the commencement of the action. Normally, the court takes proof at a bilateral hearing and reduces the evidence into a written protocol for use by both parties at a subsequent trial. It is definitely not the purpose of the procedure to discover evidence or to pry into the opponent's case. Contrary to American disclosure, the Austrian device always requires a court order and depends on a showing of circumstances which justify the apprehension of the loss of the evidence.

However, Austrian procedure is not devoid of other techniques which perform functions analogous to pretrial discovery. To begin with, the Erste Tagsatzung (initial diet) has a disclosure effect since it tends to bring certain threshold questions into the open. The Erste Tagsatzung is the only bilateral oral hearing which, in the Austrian higher courts of first instance, regularly precedes the hearing-in-chief. Normally it serves as a sort of

58. Sperl 471.
59. E.g., FRCP 27.
60. ZPO § 384. See 3 Fasching 536.
61. ZPO §§ 387, 388. See 3 Fasching 540-43.
62. Likewise distinguishable from American pre-trial discovery is the Austrian “preparatory proceeding” (Vorbereitendes Verfahren), ZPO §§ 245 et seq. It constitutes an exception to the principle of immediacy in actions pending before the collegiate court in limited situations by permitting proof-taking before a delegated single judge. The procedure has fallen into disuse and is obsolete today. See Lenhoff, The Law of Evidence, 3 Am. J. Comp. L. 313, 318 (1954).
63. ZPO § 386 (1).
64. Id. § 384 (1). See 3 Fasching 535-36. Sperl 473 points out that the principle of immediacy requires repetition of the evidence before the trial court in the absence of “special obstacles or great expense.” But see 3 Fasching 544.
65. ZPO § 239. See 3 Fasching 158-65; Sperl 533-36. In addition to holding the “initial diet” the Austrian court's main responsibility in the pretrial phase consists in the in camera examination of complaints filed in court in order to determine whether they
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calendar call, American style, with enlarged agenda, interjected between the filing of the complaint and defendant's answer. Although the hearing is presided over by a judge (usually the one who will try the case), it is in most cases a cut-and-dry affair which takes only a few minutes. The court calls the cases one by one, notes the appearances in the protocol and channels the case towards the hearing-in-chief by directing the defendant to answer the complaint. There may also be a judgment by default or by confession, a compromise or a voluntary discontinuance by the plaintiff. The ministerial and administrative nature of the hearing is underscored by the fact that the attorneys may attend it through law clerks or clerical employees. There is, however, the possibility that the defendant or the court, suam sponte, will raise certain threshold questions of a non-waivable nature, such as incurable lack of competence, res judicata and lis pendens, or that the defendant will "note" certain threshold questions of a waivable nature, which are lost unless presented at the initial diet. If so raised by the judge or "noted" by the defendant, the plaintiff with the court's assistance has ample opportunity to discover by appropriate questions directed to his opponent the exact nature of the objection and to prepare adequately for the trial of that issue either before, or at the hearing-in-chief.

Next, there is the Austrian version of "pleadings" which serve the purpose of informing the court and the adversary of the subject of the controversy. Under Austrian law the complaint and the answer must contain not only a specific demand and the facts "in detail briefly and completely" on which the claims and defenses are based, but also the proof "in detail" which the party intends to offer at the oral hearing-in-chief. The parties ordinarily need not fear that they will be hamstrung by their written alle-

should be rejected or returned to the parties for correction on formal grounds (ZPO § 84) and in making appropriate orders for proof-taking, including, in a proper case, the procurement of documents, summoning of witnesses and appointment of experts (ZPO § 183).

66. In cases triable by the "Senate," a collegiate court composed of three judges which hears cases over 100,000 Austrian shillings (approximately $4,000), the presiding judge usually holds court at the initial diet. There is no jury in civil cases in Austria.

67. ZPO § 243 (1).
68. Id. § 81 (4).
69. Curable lack of competence (ZPO § 240 (1)(2)); demand for security for costs (Id. § 59 (1)).
70. Id. § 184.
71. Id. §§ 226 (1); 243 (2).
72. Id.
gations or limited to the proof specified in the writings. The written statements are only preparatory, subject to change by amendment as the facts unfold and subordinate to the oral statements at the hearing-in-chief. Thus, the factual and legal content of the cause emerges gradually over a course of time. Normally, nothing stands in the way of new factual allegations or new offers of proof in the light of information gained at the oral hearing-in-chief. It is apparent, therefore, that in the Austrian system orality as a mode of proof-taking at the trial performs some of the functions of American pretrial discovery.

The flexibility of the Austrian procedure, however, is bought at a price. If new facts are alleged and new proof is offered as the result of "discoveries" made at the hearing-in-chief, continuances become necessary. The inevitable consequence is the diffusion of the fact-finding process and the dilution of the principle of concentration which Austria, like the United States, recognizes as a prime desideratum of effective administration of justice. Concentration demands "that the various segments of a given cause should not be allowed to fall apart, but should be compressed, concentrated within the shortest possible period of time." The Austrian Code recognizes the need for concentration by banning continuances on stipulation of the parties.

73. Id. §§ 176, 178.
74. Id. § 235. See 3 FASCHING 104-125; SPERL 823-27. Section 235 (3) sanctions amendments in the court's discretion over the opponent's objections if it will not result in undue complication or delay (erhebliche Erschwerung Oder Verzögerung). Professor Fasching states that the court should permit the amendment if it is aimed at "the final and complete adjustment of the litigious situation existing between the parties and if it is appropriate to achieve that end." 3 FASCHING 122.
75. ZPO § 179. See SPERL 368-69, 398-99. The court may reject the proof if the belated offer was made with the "obvious intent" to delay the proceedings and if the admission of the evidence would result in "significant delay." ZPO § 179 (1). In addition, belated offers may result in imposition of costs regardless of the outcome (the loser normally pays for the expense of litigation, including attorneys' fees at statutory rates) and a claim for damages in case of wanton litigation. ZPO §§ 44, 48, 49, 408. See 2 FASCHING 850-51 (1962). The author states on p. 851 that in actual practice successive offers of proof are common. Available evidence is not offered all at once, but depending upon the result of the proof taken.
76. R. Millar, Civil Procedure Reform in Civil Law Countries, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 126 (1949) (translating and quoting from KLEIN-ENGEL, DER ZIVILPROZESS ÖSTERREICHS 245 (1927)). See also Millar, The Formative Principles of Civil Procedure, 18 ILL. L. REV. 1, 24-36 (1923). Lack of concentration has been the subject of much public concern and criticism in Germany, where the situation is aggravated by a delay problem which does not exist in Austria. See L. ROSENBERG, ZIVILPROZESSRECHT 990-93 (10th ed. 1969).
77. ZPO § 134.
it authorizes adjournments on specified statutory grounds. For
instance, a continuance is authorized if a party is unable to at-
tend a hearing for very substantial reasons. An Austrian writer re-
ports that courts grant adjournments freely under that provision
on motion of both parties without any showing of good cause. An
Austrian writer reports that courts grant adjournments freely under that provision
on motion of both parties without any showing of good cause.78
Another provision covers the situation when proof which cannot
be taken immediately is essential for the continuation of the hear-
ing or when the need arises to produce documents or other
things.79 An Austrian commentator bemoans the fact that ad-
journments on this ground are granted “too generously” in actual
practice.80 His observations accord fully with this author’s recol-
lection. Several adjournments were common in the higher courts
of first instance when the author practiced law in Vienna more
than thirty years ago. Nothing seems to have changed since then.
Undoubtedly, the commentator is also correct when he notes that
rational direction of the trial and proper preparation by the judge
should exclude the procedure, extensively used in practice, to
reserve the first day of the oral hearing-in-chief exclusively for
proof-taking orders and to adjourn immediately.81 It is less clear
how frequent adjournments can be avoided in a system which
frowns upon private pre-litigation interviews of witnesses, de-
emphasizes the significance of the writings exchanged before the
oral hearing, provides no means for pretrial discovery, and rarely
puts obstacles in the way of amendments of pleadings and supple-
mental offers of proof during the progress of the proceedings. Jus-
tice would suffer if the parties were precluded from changing
position midway in the proceedings under the impact of unex-
pected developments in the proof. Moreover, the judge’s partici-
pation in the search for truth by suggesting new legal approaches
and the tapping of new sources of evidence not anticipated by the
parties may have a de-concentrating effect. Episodic proof-taking
and continuances seem unavoidable under the circumstances. Yet,
breaks in the continuity of the proceedings, even of a compara-
tively short duration, may be a setback to the principle of orality
which favors fact-finding under the immediate impact of live
proof. Making due allowance for the failings of human memory,
a judge who examines dozens of witnesses in other pending cases

78. Schima, supra note 19, at 256.
79. ZPO § 134(3).
80. 2 Fasching 699.
81. Id.
between adjournments may find it difficult to retain all the verbal and non-verbal nuances and imponderables on which the free evaluation of the credibility and accuracy of oral testimony depends. In the end, he may well decide the case on the basis of the written summary protocol of the hearings, commonly used in Austria, rather than on his own recollection. Thus, the Austrian procedure presents the somewhat heterogeneous picture of a system which espouses concentration, and yet is structured in a way that often frustrates it.

II. Trial by Colloquy

Perhaps the most perplexing task which Austria’s famous draftsman Franz Klein faced in drafting the Austrian Code of Civil Procedure was the delineation of functions of the court and the parties in a system intended to combine features of party-presentation and court-prosecution. The principle of party-presentation is the procedural companion of a system of substantive law built on recognition of private rights and duties. It guarantees to the plaintiff the right to decide whether to sue, whom to sue and what to sue for; and to the defendant the corresponding right to admit plaintiff’s claim or resist its enforcement. Destruction of the principle of party-presentation would cause the downfall of the entire system of private rights and duties. The principle of court-prosecution, on the other hand, recognizes an overriding public interest in the just, speedy and inexpensive determination of civil actions. To Franz Klein, a legal controversy was a social ill for which the substantive law provided the remedy. Procedure then performs the role of the physician who diagnoses the illness and prescribes the cure as a social service for the good of society as well as the individual litigants. Recognizing the interest of the general public in the performance of that service, the principle of court-prosecution charges the court with the duty to vindicate the public interest independent of, and at times in conflict with, the will of the parties. The two principles are not irreconcilable; but their co-existence creates tensions and frictions which require careful balancing.

Franz Klein was fully aware of the need for subtle adjustment. He created a system which accepts the thesis that it is for

82. KLEIN-ENGEL, DER ZIVILPROZESS ÖSTERREICHS 190 (1927).
the parties, and only for them, to determine the content of the cause (principle of party-presentation).\textsuperscript{83} However, he tempered that fundamental rule by mixing into the system a solid dose of court initiative, which gives the court a significant role in shaping the case and assembling the proof (court-prosecution).\textsuperscript{84} Once the action is started, the court, to a large extent, assumes responsibility for its progress. It sets the date of hearings,\textsuperscript{85} approves adjournments\textsuperscript{86} or extensions of time,\textsuperscript{87} and determines by proof orders whether, in what sequence, and at what stage of the trial proof offered by the parties shall be taken.\textsuperscript{88} It participates in the presentation of proof by examining witnesses and experts\textsuperscript{89} (a feature to be discussed in greater detail later in the study), and generally supervises all steps in the procedure.\textsuperscript{90} Moreover, while the parties alone determine the scope of contested issues, and while they retain the right to withdraw the case from the court at any time and carry the main burden of assembling the evidence,\textsuperscript{91} the court has significant \textit{sua sponte} powers of an inquisitorial nature. Foremost among these are the powers to appoint experts, to order a view contrary to the will of the parties\textsuperscript{92} and, unless objected to by both parties, to call witnesses and procure documents under specified conditions.\textsuperscript{93}

In addition, and most important, Franz Klein's Code gave birth to a unique feature which was destined to become a leading characteristic of the German Code as well as the Austrian—trial by colloquy of the court and the litigants. This new technique finds its statutory expression in section 182 of the Austrian Code.\textsuperscript{94} It makes the judge a sort of informal collaborator with carefully measured assistential and advisory duties, reserving, however, to the litigants the ultimate decision in shaping the case.

\begin{itemize}
\item \textsuperscript{83} Id. at 170.
\item \textsuperscript{84} Id. at 192.
\item \textsuperscript{85} ZPO §§ 130 \textit{et seq.}
\item \textsuperscript{86} Id. § 134.
\item \textsuperscript{87} Id. §§ 128, 243.
\item \textsuperscript{88} Id. §§ 277, 278, 444. See \textit{Sperl} 397-400.
\item \textsuperscript{89} See \textit{Sperl} 400.
\item \textsuperscript{90} Id. at 364-70.
\item \textsuperscript{91} Id. at 360, 376.
\item \textsuperscript{92} ZPO § 183 (1) \textit{[4].}
\item \textsuperscript{93} Id. §§ 183 (1) \textit{[2,3]}, (2).
\item \textsuperscript{94} ZPO § 182, para. 1. This paragraph provides that:
\end{itemize}

\begin{quote}
At the oral hearing the presiding justice shall see to it, through questions or other means, that the factual statements relevant to the decision are made, or insufficient statements in support or defense of the claim supplemented, that the means of proof
\end{quote}
The method employed is not foreign to American law teachers versed in the Socratic method of legal education. The judge may summon the parties to appear at the trial, but under the Austrian law he has no power to compel them to come.\(^5\) He has the duty to discuss the case thoroughly\(^6\) and to ask questions designed to lead the parties to a better understanding of their claims and defenses; the parties, however, need not answer the questions.\(^7\) He must use every effort to assure that the parties make a full statement of all pertinent facts and produce the evidence essential to establish their claims and defenses; the parties need not, however, take the advice, well-meant as it may be.\(^8\) Questions are not the sole means of judicial tutoring envisaged by the Code. The judge may also accomplish the statutory purpose by “other means.”\(^9\) Suggestions, comments and instructions from the bench seem to be appropriate.\(^10\) The statutory purpose to encourage a meaningful three-cornered dialogue is complemented by the right of the parties to direct questions to each other and by their obligation to be truthful.\(^11\)

In this connection the function of the judge as a peace-maker should not be overlooked. In harmony with the policy of curbing the “social evil” of litigation and in keeping with the active role assigned to the judiciary in civil litigation, the Austrian Code authorizes the judge, at any stage of the litigation, to attempt an amicable adjustment of the controversy, be it by compromise, confession of judgment or discontinuance. The statute is not in the least squeamish about the judge’s function as a promoter of settlements. It states expressly that he may act on motion or on his own initiative.\(^12\)

\(^5\) ZPO § 183 (1) [1]. See Petscher-Stagel, supra note 57, at 225 (matrimonial and status cases are the exception); Sperr, 363.

\(^6\) ZPO § 180 (3) provides in part: “The presiding justice must see to it that the cause is discussed to the fullest extent. . . .”

\(^7\) See 2 Fasching 872.

\(^8\) Id. at 870.

\(^9\) ZPO § 182 (1).

\(^10\) See 2 Fasching 872.

\(^11\) ZPO §§ 184, 178. See Sperr, 373-76.

\(^12\) ZPO §§ 299 (2), 204 (1). See also id. § 433.
Ingeniously devised, as it is, the Austrian system nevertheless demonstrates the problems encountered in combining the principle of court-prosecution with a system of party-presentation. The Austrian judge in performing his statutory duties has the unenviable task of feeling his way along the dim border-line between asking too many or too few questions, explaining too much or too little, and giving too much or not enough advice and assistance. Any significant deviation from the allowed course in one or the other direction may taint the proceeding with reversible error.\(^\text{103}\) There is no doubt that the statute means business when it directs the judge in absolute terms to see to it by the means indicated that all operative facts are presented to the court, that the proof is properly specified and that all explanations are given in order to enable the court to ascertain the objective truth.\(^\text{104}\) Incompleteness, incomprehensibility and inconsistency of factual allegations, as well as indefinite or self-contradictory demands, appear to be within the scope of the court's corrective and advisory duties.\(^\text{105}\) In no event may the court spring a surprise upon the parties by applying a legal theory not previously discussed with them which would have required further proof-taking.\(^\text{106}\) However, in performing these statutory duties, the judge must tread cautiously. By all means he must avoid the appearance of partiality. It would, therefore, be improper if in the give-and-take of the oral discussions he would, so to speak, put specific motions into the mouths of the parties or if he would act as if he were the litigant's lawyer.\(^\text{107}\) His questions should keep within the claims presented and respect the parties' will in selecting means of attack or defense,\(^\text{108}\) although it has been suggested that the judge in putting "informative questions" may go beyond the matters covered by the pleadings.\(^\text{109}\) And since the questions are for information only and do not constitute proof, the limitations which normally govern

\(^{103}\) Id. § 496 (1) [2,3]; (3). See 2 FASCHING 873; Sperl 641-42.

\(^{104}\) ZPO § 182 (1), supra note 94.

\(^{105}\) See 2 FASCHING 870-71, 873.

\(^{106}\) 20.II.1963, 6 Ob 292/63, ÖJZ 1964, at 238. See also 2 FASCHING 874. Cf. Diemer v. Diemer, 8 N.Y.2d 206, 168 N.E.2d 654, 203 N.Y.S.2d 829 (1960). (In an action for separation which was pleaded, tried and appealed on a theory of cruel and inhuman treatment, New York's highest court granted a separation on the ground of abandonment.)

\(^{107}\) 10.9.1959, 6 Ob 249/59. See 2 FASCHING 871.

\(^{108}\) See 2 FASCHING 870, 872.

\(^{109}\) Id. 872.
proof-taking by examination of the parties do not apply in putting the questions.\textsuperscript{110} While it has been said, on the one hand, that the judge is under no obligation to advise parties represented by counsel concerning the allegations necessary to support their claims or defenses,\textsuperscript{111} the courts have also made it clear that the judge's responsibility under section 182 is by no means limited to parties appearing without counsel and that the court is always free to warn the parties of procedural pitfalls even if they have lawyers.\textsuperscript{112} It is no wonder that a commentator, anticipating the misgivings of the student who is confronted with the opaque and contradictory state of the law, attempts to put his mind at rest by placing the court's assistant and advisory function in the category of "imponderable expressions of a sense of values."\textsuperscript{113} The trouble is that it is not the trial judge's sense of values that counts, but that of the appellate court which reviews the conduct of the trial judge, and that it is very difficult to gauge another person's sense of values which is guided by moral and ethical, rather than legal precepts.

What is the lesson to be learned from the Austrian experience? Franz Klein's notion of trial by colloquy is brilliantly conceived. Its gentle operation by questions, suggestions and advice puts it in sharp contrast to a system of "authoritative tutorship"\textsuperscript{114} which forces justice upon the litigants rather than dispenses it to them. Trial by colloquy "humanizes" the relation between the judge and the litigants; it enables him to function beyond hearing and deciding cases; it places him in a position where he can aid a litigant whose lack of skill or resources puts him at an unfair disadvantage; and it provides a corrective device against the harshness of the adversary system without transforming it into a bureaucratic, inquisitorial system. On the debit side, it appears from the preceding discussion that the execution of Franz Klein's idea in actual practice has proved more difficult than its originator may have anticipated. When a judge, in exercise of his decisory function, plays an active

\textsuperscript{110} Id.
\textsuperscript{111} 20.3.1957, JBL. 1957 at 647. See 2 FASCHING 871.
\textsuperscript{113} 2 FASCHING 871. Cf. SCHIMA, supra note 19, at 270.
\textsuperscript{114} See RÜMELIN, RECHTFOLIE UND DOKTRINE IN DER BÜRGERLICHER RECHTSPFLEGE 31 et seq. (1926) .
role in the presentation of the case, he is close to the point where the integrity of the adversarial process is in jeopardy. The potentiality of the colloquy method for relieving the extremes of the adversary system and equalizing the opportunities of the litigants must be weighed against the risk of judicial over-involvement in the partisan efforts which threatens the integrity of the judicial process. The Austrian courts, in seventy-five years of experience, have not been able to define the court's powers and duties clearly for guidance of the judiciary. The uncertain dimension of the principle of judicial guidance in Austria may be responsible for its uneven implementation by the courts. According to this writer's recollection, it was not a frequent practice for Austrian judges to carry on extensive discussions with the parties as envisaged by the Code, at least when they were represented by attorneys. Information gathered from lawyers presently engaged in practice in Austria tends to confirm this recollection.

The American institution which comes nearest to utilization of the colloquy method is the pretrial conference. This device, which is available under the Federal Rules of Civil Procedure and under a number of state provisions, might be likened to a pretrial agenda meeting called by the court to give direction to the proceedings and establish a cooperative pattern for the conduct of the trial. Included among its objectives are the identification and simplification of the issues of law and fact, understandings between the court and the parties concerning modes of proof, order of presentation, limitation of the number of expert witnesses, the projected length of the trial and similar matters. Usually the meeting is informally conducted in the hope that a spirit of cooperation will prevail. As one writer aptly points out, pretrial "best succeeds when the judge thinks not in terms of power, but of persuasion; not in terms of his authority, but of reason." Frequently the pretrial judge is not the same judge

115. FRCP 16.
117. The pretrial conference is discretionary in some jurisdictions and mandatory in others. For a summary of federal practice see J. Moore, Federal Practice and Procedure ch. 18 (1962). For a bibliography see M. Rosenberg, The Pretrial Conference and Effective Justice 230 (1964). See also Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961) (where the policy underlying the pretrial conference is explained).
who will preside at the trial. The position of the pretrial judge is far less sensitive if he does not participate in the determination of the merits. The conference culminates in a pretrial order which sums up the results of the conference, including the court's directions pertaining to the forthcoming trial.\textsuperscript{119}

As mentioned before, the Austrian Code provides for judicial promotion of settlements. By contrast, the word "settlement" does not appear in the Federal Rule governing the pretrial conference. The Americans have not reached a consensus concerning the judge's role in proposing or urging settlements. However, informal discussions between the parties in the presence of the judge and with his active participation quite naturally create a favorable atmosphere for exploring the possibility of settlement. Since discovery normally precedes the pretrial conference, the parties may welcome the opportunity "to talk settlement" without losing face, at a moment when they can appraise realistically the chances of victory.\textsuperscript{120}

While American procedure uses colloquies of the court and counsel to advantage in the pretrial phase, it does not, in general, carry this mode of communication beyond the pretrial conference. The tense atmosphere of the tightly structured and highly concentrated American trial does not invite relaxed, informal discussions in conference style. In jury trials, particularly, frequent dialogues between the court and the litigants would interrupt the flow of the evidence and might be a source of annoyance and confusion to jurors. Moreover, the American variety of the adversary system which reaches for the truth through the litigants' competitive quest for victory favors a separation of functions of the court and the parties, assigning the task of assembling and presenting the proof to the parties, and of drawing conclusions from the evidence to the court or the jury. Participation by the judge in the process of collecting the cause materials and his engagement in colloquies with the litigants in an assistant and advisory capacity would blur to some extent

\textsuperscript{119} Undoubtedly the flexible wording of the federal rule permits the granting of an accelerated judgment disposing of the entire litigation or of some of the issues in a proper case. \textit{See} Louisell, \textit{supra} note 118, at 662.

\textsuperscript{120} A study undertaken by Professor Rosenberg came to the conclusion that the pretrial conference does not increase the number of settlements or shorten the trial time. \textit{M. Rosenberg, supra} note 117, at 67-70. For a contrary view, \textit{see} A. Levin \& E. Wooley, \textit{Dispatch and Delay} 63-66 (1961).
ORALITY

the traditional separation of functions. It might also compromise
the judge's impartiality in fact or, at least, in appearance. One
must not forget that the American judge, contrary to the Austrian
career judge, comes from the ranks of practitioners whose busi-
ness it is to be good partisans. It takes little to awaken the advo-
cate's instinct in a judge reared in the tradition of the American
adversary system once he takes a position in the ring. American
judges therefore are reluctant to act as "guidance counselors" to
litigants. Depending on their temperament and disposition, they
assume a more or less passive role. Like spectators, they see and
hear the actors and pass judgment on their performance, but
they do not get into the act. They do, however, maintain strict
discipline and decorum among the jury and the litigants, and ac-
cept responsibility for moving cases along expeditiously through
tight calendar control, dismissals for failure to prosecute and sim-
ilar techniques. When the controversy affects public interest or
when one of the adversaries is at a distinct disadvantage because
of a glaring disparity of resources, the court might even abandon
its position of aloofness and participate in the proof-taking proc-
ess by asking supplementary questions or, in rare cases, call for
the production of evidence not offered by the parties. Occasionally
the court may also engage in informal discussions with the
parties during the progress of the trial. For example, in a jury
trial there may be a "huddle" of the court and the lawyers out-
side the hearing of the jurors to discuss special problems, or the
court may order an interruption of the trial to give to the court
and the lawyers an opportunity to meet in chambers for a con-
ference, usually concerned with the possibility of a settlement.
Such interludes, however, are not a regular feature which the law
prescribes or even encourages. At the present time the average
American case is tried by the parties before the court and not,
as in Austria, by the judge with the cooperation of the parties.
By separating the stage of colloquy from the trial stage the Ameri-
can procedure avoids the problems of the Austrian judge, but it

121. Cf. L. Fuller, Problems of Jurisprudence 706-08 (1949). See also Wyzanski,

122. See Johnson v. United States, 38 U.S. 46, 81-94 (1948) (dissenting opinion
of Mr. Justice Frankfurter); Kaplan, Civil Procedure—Reflections on the Comparison
of Systems, 9 Buffalo L. Rev. 409, 423 (1960). See also infra notes 158-61, and accompanying
text.
also loses many of the benefits derived from a continuing dialogue.

III. ORALITY AS MODE OF PROOF-TAKING

Both Austria and America rely on oral testimony in open court as the basic mode of proof-taking at the trial. The advantages of oral presentation of the evidence directly to the decisory organs have been stressed time and again and require no further elaboration in this study. However, the two systems differ sharply in their methods of producing and interrogating witnesses. The differences are not merely formal. They reflect the contrasting roles of the court and the parties under the Austrian and American variants of the adversary system, the former being modified significantly by elements of court-prosecution while the latter preserves the principle of party-prosecution with only minor deviations.

In Austria, no witness can be placed on the stand unless the judge first orders that his testimony be taken. While normally the parties offer the witnesses, it is for the court to admit the testimony and define the subject of proof by a proof order. It bears repetition that no finality attaches to the proof order.2 The court may rescind or change it in the course of the proceedings and make new orders from time to time as the exigencies of the case may require.24 Normally the court summons the witnesses,25 although occasionally a party offers a witness at a hearing-in-chief and simultaneously informs the court that the witness is present and ready to testify.26 In most instances, the witnesses have neither been interrogated, let alone "prepared" by the lawyer.27 Once the court determines to hear a witness, he is the court's witness.28 The common law rule against impeachment of the credibility of one's own witness29 is unknown in Austria. The court may also call a witness on its own motion, but

123. ZPO §§ 277-78.
125. ZPO §§ 329-31.
126. In general, however, this practice is looked at as being contrary to the draftman’s intention. See 3 FASCHING 440-41; Sperl. 436.
127. Cf. note 45 supra.
128. See 3 FASCHING 441.
129. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 70-73 (1954)
he cannot be interrogated if both parties object. The latter provision is incompatible with the spirit of the Austrian Code. It is worth noting that Franz Klein's original draft gave the judge the explicit and unlimited power to call a witness from whom he expects information concerning relevant facts, on his own motion, at any stage of the proceedings.

In the United States there is no proof order. The clerk of the court, at the attorney's request or, in some jurisdictions, the attorney acting as officer of the court, summons the witnesses by issuing a subpoena. Quite frequently the parties bring witnesses to the trial. The party "offers" the witness simply by placing him on the stand and asking questions. Interrogation proceeds under the court's reasonable control, subject to the opponent's objections on appropriate grounds. It is normal practice for the lawyers to interview beforehand those witnesses on whom they intend to rely at the trial and to obtain their written statements. Moreover, as previously discussed, pre-trial examination of some or all the witnesses frequently precedes proof-taking at the trial. In one respect the judge's powers are broader than in Austria. It seems that, in theory at least, he may call a witness not offered by either party and interrogate him even over the protest of both parties.

By far the most important distinction between Austrian and American proof-taking relates to the mode of interrogating witnesses. In Austria the judge conducts the primary interrogation. He is required to explore the relevant facts by appropriate questions which extend not only to the source of the witnesses' knowledge (hearsay, subject to free evaluation, is ad-
It is quite common that the judge starts the interrogation by inviting the witness informally, though under the sanction of criminal prosecution for false testimony or perjury, to tell his story in his own words, interrupting him only occasionally when he gets too general or too prolix, and following the witness' narrative with specific questions. After the judge has finished his examination, the parties, subject to the court's control, may ask supplementary questions limited to the cause materials and their probative force. Usually the parties' subsidiary questioning is restrained and brief. There is no cross-examination in the American sense. Like Daniel who interrogated Susannah's accusors separately, thereby preventing them from conforming their testimony, the Austrian judge normally sequesters the witnesses. Confrontation of witnesses who gave conflicting testimony is permitted. In general, since most of the questioning originates from a neutral source, the tense and nervous atmosphere of the "battle of wits" between the examiner and the witness, characteristic of the American cross-examination, is missing at the Austrian trial.

In the United States the procedure is exactly the reverse. Primary questioning originates with the parties who interrogate the witnesses alternately. The basic philosophy is that adversary questioning is likely to divulge the relevant facts bearing on the issue since each party strives for victory and therefore will make every effort to bring all facts favorable to his side of the case to the court's attention. Unfortunately, it is also true that each party, prompted by the desire to win, has a vital interest to suppress relevant but unfavorable information. In any event, the successful operation of adversarial proof-taking presupposes that the parties are evenly matched. As Professor Morgan put it, "if

140. ZPO § 340; see Sperl 438.
141. AUSTRIAN PENAL LAW § 199 lit. a.
144. ZPO § 339 (4).
145. Normally, the examination of a witness proceeds in four phases: the direct examination by the party who produced the witness, the cross-examination by his opponent, the re-direct examination by the former, and the re-cross-examination by the latter. See C. McCormick, supra note 129, at 6-7.
[the adversarial system] . . . were to operate perfectly, both parties would have the same opportunities and capacities for investigation, including the resources to finance them, equal facilities for producing discoverable materials, equal good or bad fortune with reference to availability and preservation of evidence, and equal persuasive skill in the presentation of evidence and arguments."

The most controversial part of the American interrogation process is the cross-examination which exploits the possibilities of orality in proof-taking to the very limit. Since the initial examination is conducted by the party who produced the witness, the cross-examination is the necessary complement, affording to the adversary the opportunity to test the accuracy, completeness and credibility of the testimony. Style and technique range from soft and cunning persuasion to brow-beating and intimidation. The leading question is the staple technique of the cross-examiner. Attention to minute detail and painstaking, in-depth analysis of factual issues are earmarks of the American method. In general, the courts allow the lawyers great latitude in questioning, although the witness is entitled to the court's protection if he is harassed unduly or exposed to unfair tactics.

Whether the sharply accentuated style of the Americans or the gentle approach of the Austrians is more likely to bring out the truth is a moot question. Cross-examination has received lavish praise from eminent jurists since the days of Bentham. Wigmore asserted that "no safeguard for testing the value of human statements is comparable to that furnished by cross-examination." In his opinion, "cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American law." A prominent trial lawyer referred to cross-examination as "a bulwark of liberty" and "an incomparable art." Case law is unanimous in stating that a party must not be de-


147. Literature on cross-examination abounds. For an elaborate exposition, see 5 Wigmore §§ 1867-94; 6 Wigmore §§ 1884-94. For a concise summary of the American law, see C. McCormick, supra note 129, at §§ 19-32.


149. 5 Wigmore 29.

150. Id.

prived of the "invaluable privilege" of cross-examination which is "the crucial test of credibility." Yet, cross-examination which rests on adversarial, high-pressure questioning of witnesses by the litigants should not be confused with accessibility of the witnesses to both parties which, indeed, is an essential attribute of the principle of a bilateral hearing. If cross-examination really is "the greatest legal engine ever invented for the discovery of truth," one wonders why other legal systems have not imported that fabulous "engine." The Swedes, who in practice, at least, permit the parties to conduct the initial examination, have modified the Anglo-American technique of cross-examination by permitting the witness to narrate the story in his own words, rather than by responding to specific questions. Even in the United States the protective taboos which surround cross-examination have not deterred sharp criticism from well-informed sources. Some experts in the field have pointed to the limited utility of cross-examination as compared to the overwhelming importance of testimony elicited on direct examination. Others have questioned the integrity of the device pointing an accusing finger at its potential for mischief and gross abuse. They have received unintended support from a mass of how-to-do-it literature that gives advice on how, by mastering the "art" of cross-examination, lawyers might win cases which they should lose if justice prevailed.

Probably the most effective counter-measures against harmful effects of adversarial proof-taking within the framework of the existing adversary system should be the more liberal exercise of

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152. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).
153. 5 WIGMORE 29.
154. R. Ginsburg & A. Bruzelius, CIVIL PROCEDURE IN SWEDEN 288 (1965). Denmark and Norway likewise provide for examination by the lawyers. Bruns, ZIVILPROZESRECHT 329-30 (1968), favors the introduction of examination, cross-examination and re-examination by the attorneys in German practice.
155. J. Reed, CONDUCT OF LAWSUITS 275 (2d ed. 1912). C. McCormick, supra note 129, at 59, asserts that cross-examination today is primarily "the means of gleaning additional facts from the opponent's witnesses" but that "it no longer looms as a determinant of victory." See also id. at 8-9.
156. See J. Frank, COURTS ON TRIAL 80-102 (1949); C. McCormick, supra note 129, at 59-60; H. Taft, WITNESSES IN COURT 81 (1934).
157. See J. Frank, supra note 156, at 82, where it is stated that: Longnecker, in his book HINTS ON THE TRIAL OF A LAWSUIT (a book endorsed by the great Wigmore), in writing of the "truthful, honest, over-cautious" witness, tells how a "skillful advocate by rapid cross-examination may ruin the testimony of such a witness."
the court's common law power to ask questions at any stage of the proof-taking process and to require, where appropriate, testimony by free narrative in preference to specific questions on the direct examination by the party who produced the witness.

It is generally assumed today that the judge has the power to interrogate witnesses, \(^{158}\) whether called by himself \(^{159}\) or by a party. \(^{160}\) However, does he exercise that power? This writer's limited experience, based on observations in the State of New York and random sampling of records on appeal, indicates that judges use the right of interrogation most sparingly and cautiously. Judge Frank confirms that "the court relies almost entirely on such evidence as one or the other of the private parties to the suit is . . . able to and . . . chooses to offer." \(^{161}\) Virtually every book on cross-examination, including the how-to-do-it variety, cautions the young and inexperienced lawyer that the "critical" decision is whether or not to cross-examine. \(^{162}\) One wonders if that decision would be as momentous as it apparently is, if judges were to abandon their passive attitude with respect to participation in the questioning. There are, of course, reasons for the judge's reluctance to be drawn into the proof-taking process. Some have already been mentioned. \(^{163}\) It might be added here that American judges, most of whom were district attorneys or trial lawyers before ascending the bench, are attuned to cross-examination and generally disinclined to curtail its effectiveness by questions from the bench. Moreover, they apprehend that questions would be construed as subrosa attempts to circumvent...

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160. Proposed Fed. Rules of Evidence, Rule 6-14, would expressly provide:
(a) Calling By Judge. The judge may, on his own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
(b) Interrogation By Judge. The judge may interrogate witnesses, whether called by himself or by a party. The parties may object to questions so asked and to evidence thus adduced at any time prior to the submission of the cause.
46 F.R.D., 161, 310 (1969). With respect to judicial power to interrogate witnesses, the Advisory Committee states, "the authority of the judge to call witnesses is well established." Id.
161. J. Frank, supra note 156, at 96.
162. 5. Wigmore § 35.
163. See text accompanying notes 121-22 supra.
a prohibition against commenting on the evidence, in effect in
many jurisdictions.164 Even in states where judges are free to
comment on the evidence they must be careful not to assume the
role of the advocate.165

Turning to the form of testimony it seems clear that the
court's right to supervise questioning by counsel includes the
power to require testimony by free narrative on the direct exami-
nation.166 A witness who speaks freely and without interruption
is more likely to reveal the truth than one who gives rehearsed replies to rehearsed questions, carefully phrased to
avoid divulgence of unfavorable information.

Looking into the future, and considering the possibility of
departing from the frame-work of the present system, the time
may be ripe to bring together psychologists and lawyers in an
extended cooperative effort to measure and evaluate by scientific
methods the effect of cross-examination on the human mind. The
results of such a study may enable us to pass value judgments
based on more than "[t]he belief, or perhaps hope, that cross-
examination is effective in exposing imperfections of perception,
memory, and narration. . . ."167

CONCLUSION

The principle of orality viewed in historical perspective
stands for a whole program of reform. It was the battle cry of an

164. See 9 WIGMORE §§ 2551, 2551 (a). As to the federal courts' right to comment on
the evidence, see 5 MOORE ¶ 51.07; J. MAGUIRE, supra note 138, at 737-40; VANDERBILT
MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 224-29 (1949). Cf. PROPOSED FED. RULES

165. See C. McCORMICK, supra note 129, at 13. Cf. Advisory Committee's Note to
Rule 6-14 of the PROPOSED FED. RULES OF EVIDENCE, warning that the judge's authority
to ask questions would be abused when the judge assumes the role of advocate. 46 F.R.D.

166. See Advisory Committee's Note to PROPOSED FED. RULES OF EVIDENCE, Rule 6-11,

167. PROPOSED FED. RULES OF EVIDENCE, Introductory Note to Art. VIII: HEARSAY, 46
F.R.D. 161, 325 (1969). Literature on the psychology of testimony is cited in M. CAPPELLETTI,
LA TESTIMONIANZA DELLA PARTE NEL SISTEMA DELL'ORALITA 183 n.10 (1962). See
references to staged experiments relating to reliability of testimony elicited by free
narrative, direct and cross-examination cited in C. McCORMICK, supra note 129, at 59 n.4.
See also Slovenko, Witness, Psychiatry and the Credibility of Testimony, 19 U. Fla. L.
Rev. 1 (1966); Haward, Some Psychological Aspects of Oral Evidence, 3 British Journal
of Criminology 342 (1962); Kubie, Comment--Implications for Legal Procedure of the
Fallibility of Human Memory, 108 U. Pa. L. Rev. 59 (1959); Redmount, The Psycholog-
ical Basis of Evidence Practices: Memory, 50 CRIM. L. COMMENTS & ABSTRACTS 265 (1959); S. FREUD,
Psycho-Analysis and the Ascertaining of Truth in Courts of Law, in 2 COLLECTED PAPERS OF SIGMUND FREUD 13 (1906).
army of philosophers, scholars and practitioners who sought to topple the dominance of the written procedure of the *jus commune* and to replace it by modern systems, built on publicity, free evaluation of evidence and direct oral communications between the court and the litigants. Today the battle is over. It ended with an impressive victory for orality both in the East and West. Remaining islands of resistance will disappear sooner or later. Yesteryear's broad approach to the principle of orality tends to assign to it an ideological significance which it has no longer. Today, we can afford to look at orality soberly as one of two alternative forms of procedural communications, each serving justice in its own way. No one will deny that orderly procedure must, in part at least, depend on writings which have the advantage of permanence, easy verification and reviewability.

While there is no need to elevate orality to an immutable postulate of legal policy, one should not, on the other hand, underrate its importance. Orality is a concept of great versatility whose usefulness extends over a large area. It would be a mistake to believe that oral proof-taking before the triers of fact exhausts its potentialities. In this paper some of the functions of orality in civil procedure in Austria and the United States have been described and compared from a strictly functional point of view, keeping in mind the purpose served and the effect on other governing principles of procedure.